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An Opportunity to Be Heard: The Right to Counsel in a Deportation Hearing

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AN OPPORTUNITY TO BE HEARD: THE RIGHT TO COUNSEL IN A DEPORTATION HEARING

Hernan Castro-O'Ryan stood before the immigration judge ("IJ") at his deportation hearing in Arizona and asked for a change of venue. His attorney and material witnesses lived in San Francisco, and he could not afford to pay for their transportation to the hearing. Mr. Castro-O'Ryan was a lawful permanent resident who had first entered the United States nine years earlier.[1] His prior criminal conviction, however, made him deportable. When faced with deportation he applied for withholding of deportation and for asylum because of past persecution in Chile.[2]

The IJ refused to rule on the request for a change of venue. Mr. Castro-O'Ryan, whose English was lacking,[3] was forced to present his claims for relief without legal assistance. The IJ then denied these claims and ordered him deported. Without the assistance of an attorney, Mr. Castro-O'Ryan was unable to persuade the judge that he was a victim of persecution in Chile, and the judge erroneously ruled that the prior criminal conviction prohibited both forms of relief.[4]

The deportation hearing is the only opportunity for aliens to plead their cases to remain in this country.[5] The adversarial setting of a deportation hearing forces aliens—who may lack English language skills and knowledge of our culture and laws—to conduct the presentation in a trial-like atmosphere.[6] Added to this burden is the complex nature of our immigration law.[7] The process often fails to give aliens a fair opportunity to be heard.

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1. Castro-O'Ryan v. INS, 821 F.2d 1415, 1416 (9th Cir. 1987).

2. He testified that in 1975 the Chilean Army tortured him for belonging to a student political organization. The Army also arrested his uncle twice and eventually shot and killed him. Mr. Castro-O'Ryan then fled the country. *Id.* at 1417–18.

3. *Id.* at 1420.

4. *Id.* at 1419. On appeal, the Ninth Circuit Court of Appeals found that the immigration judge's ("IJ") denial of access to counsel was "seriously" prejudicial. *Id.* at 1420. First, without the assistance of counsel, Mr. Castro-O'Ryan was unable to articulate the basis of his fear of persecution during oral examination. Second, any competent immigration attorney would have realized the judge's failure to apply the statute correctly; the prior conviction barred only withholding of deportation. *Id.*

5. Aliens are deportable on three grounds: Violating entry requirements, overstaying temporary visas, and committing misconduct after entry. Immigration & Nationality Act of 1952 [hereinafter INA] § 241(a)(1)–(19), 8 U.S.C. § 1251(a)(1)–(19) (1982 & Supp. IV 1986). This section describes in detail the grounds for deportability in 19 separate paragraphs, many of which contain multiple groups and include criminal, subversive, and "immoral" activities.

6. *See infra* notes 17–20 and accompanying text.

7. Immigration law has long been a complex sub-specialty in U.S. law: "With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal

This Comment explores the problems aliens in deportation hearings face in obtaining legal assistance under the current law. Our adversarial system of justice traditionally recognizes the need for participants to have the benefit of professional and knowledgeable legal assistance.[8] Congress has given aliens a statutory right of access to counsel through the Immigration and Nationality Act ("INA").[9] This right, however, is not being uniformly extended to aliens in deportation hearings.[10] Part of the problem is financial. Although aliens have a right to counsel, the INA does not provide government assistance for aliens unable to pay attorneys.[11] The ultimate result is that an indigent alien has no right to appointed counsel.[12] Circuit courts have responded to this problem by using a case-by-case review. In some cases the courts have determined that lack of counsel can prejudice an alien enough to amount to a denial to the right, and even a denial of constitutional due process.[13] This Comment proposes an alternative uniform approach which would provide a meaningful right to counsel for aliens in deportation hearings and lead to consistency in the circuit courts.

Revenue Code in complexity.' " Castro-O'Ryan v. INS, 821 F.2d 1415, 1419 (9th Cir. 1987) (quoting E. HULL, WITHOUT JUSTICE FOR ALL 107 (1985)); Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) (Immigration and Nationality Act resembles "King Mino's labyrinth in ancient Crete").

8. In Powell v. Alabama, 287 U.S. 45, 69 (1932), where the Court required appointed counsel for indigent criminal defendants in a capital trial, Justice Sutherland stated that the right to be heard needs to include the assistance of counsel: "Even the intelligent and educated layman . . . requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." The Supreme Court eventually extended an absolute right to counsel to all criminal defendants facing possible imprisonment. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

9. INA § 292, 8 U.S.C. § 1362 (1982).

10. Many times the IJs deny aliens their statutory right to counsel. A denial can be failure to inform an alien of the right, lack of reasonable opportunity to obtain access to counsel, or an ineffective waiver of the right by the alien. *See infra* notes 65–76 and accompanying text.

11. INA § 292, 8 U.S.C. § 1362 (1982); *see infra* note 55 and accompanying text.

12. *See infra* note 61.

13. *See infra* notes 60, 77–85 and accompanying text.

I. AN ALIEN'S RIGHT TO COUNSEL—THE CURRENT STATE OF THE LAW

A. The Deportation Hearing

1. Nature of the Hearing

When faced with an Immigration and Naturalization Service ("INS") order to show cause,[14] an alien in a deportation hearing has a choice either to challenge the grounds for deportation or to apply for relief from deportation. An alien can challenge the grounds by demonstrating United States citizenship or by refuting the allegations of the deportable act.[15] Alternatively, an alien can concede deportability and then present a claim for relief from deportation.[16]

The deportation hearing is an adversarial proceeding[17] in which the alien can present evidence, offer witnesses to testify, rebut the government's evidence, and cross-examine government witnesses.[18] An INS trial attorney represents the government in presenting the case against the alien.[19] The hearing's adversarial nature is heightened by the fact that the IJ, who presides over the hearing, often plays an active role by questioning the alien directly.[20] The immigration court keeps a record of the hearing[21] and allows an interpreter, if necessary.[22] The alien has a right to be present and to participate, but his or her presence is not required.[23] Once all the evidence is presented, the IJ

14. An order to show cause requires the alien to show cause why he or she should not be deported and directs the alien to appear before an IJ in a deportation hearing. 8 C.F.R. § 242.1(b) (1988).

15. 8 C.F.R. § 242.16 (1988).

16. 8 C.F.R. § 242.17 (1988); *see infra* notes 30–48 and accompanying text.

17. Escobar-Ruiz v. INS, 813 F.2d 283, 293 (9th Cir. 1987) (deportation proceeding is "adversary adjudication" for purpose of Equal Access to Justice Act), *aff'd en banc* 838 F.2d 1020 (9th Cir. 1988).

18. INA § 242(b)(3), 8 U.S.C. § 1252(b)(3) (1982); 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE §§ 5.8, 5.9f,g (1987). *See generally* Wasserman, *Practical Aspects of Representing an Alien at a Deportation Hearing,* 14 SAN DIEGO L. REV. 111 (1976).

19. Regulations state that the IJ must request an Immigration and Naturalization Service ("INS") attorney whenever deportability is an issue or the alien is incompetent or under the age of 16 and without representation by a guardian, relative, or friend. 8 C.F.R. § 242.9(b) (1988). However, under current practice, an INS attorney participates in virtually all deportation proceedings. 1A C. GORDON & H. ROSENFIELD, *supra* note 18, at § 5.7(c).

20. INA § 242(b), 8 U.S.C. § 1252(b) (1982). *See generally* T. ALEINIKOFF & D. MARTIN, IMMIGRATION: PROCESS AND POLICY 88 (1985).

21. 8 C.F.R. § 242.15 (1988).

22. 8 C.F.R. § 242.12 (1988).

23. INA § 242(b), 8 U.S.C. § 1252(b) (1982); *see* Patel v. INS, 803 F.2d 804 (5th Cir. 1986) (alien's due process claim fails when hearing proceeded in absentia because alien had reasonable notice and opportunity to appear with an attorney).

renders an opinion explaining the basis for the decisions on deportability and any claims for relief.

Deportation is harsh; its consequences parallel punishment for a crime.[24] If the INS deports an asylum seeker, for example, that person may be persecuted in the country to which he or she is deported.[25] Deportation of aliens who have spent a long time in this country may, in the words of Justice Brandeis, "result also in loss of both property and life; or of all that makes life worth living."[26] Banishment from this country may separate an alien from a spouse and children who may even be American citizens.[27] An alien may also be sent to a strange land.[28] Worst of all, an alien may be left with no country to turn to and be detained indefinitely.[29]

2. *Forms of Relief From Deportation*

An alien may apply for relief from deportation under various provisions of the INA,[30] which require the alien to meet specific statutory criteria. Yet meeting statutory criteria does not always ensure relief; for most forms of relief, an alien must obtain a favorable exercise of discretion as well.[31] Since the ultimate decision usually rests within

24. *See, e.g.,* Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) ("Deportation can be the equivalent of banishment or exile."); Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted.").

25. Repatriation of asylum applicants might also violate the *non-refoulement* provision in the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267, (ratified by U.S. Nov. 1, 1968). The Protocol incorporates Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, which prohibits the return, or *refoulement*, of refugees.

26. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

27. *See, e.g.,* Harisiades v. Shaughnessy, 342 U.S. 580, 591 (1952) (three aliens with citizen spouses and children deported due to aliens' prior membership in Communist Party).

28. *See, e.g., In re* Salim, Int. Dec. No. 2922 (BIA Sept. 29, 1982) (Afghanistan refugee requesting withholding of deportation deported to Pakistan); *see also* INA §§ 243(a)(1)–(7), 8 U.S.C. § 1253(a)(1)–(7) (1982) (ranking the options of countries to which aliens shall be deported).

29. *See, e.g.,* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215 (1953) (lawful permanent resident for 25 years found excludable on re-entry can be detained indefinitely if no country will accept him or her).

30. Specific relief provisions are scattered throughout the INA. *See, e.g.,* INA §§ 208, 212(c), 241(f), 242(b), 244, 245, 249, 8 U.S.C. §§ 1158, 1182(c), 1251(f), 1252(b), 1254, 1255, 1259 (1982 & Supp. IV 1986). Regulations place a burden on the alien to establish statutory eligibility. 8 C.F.R. § 242.17(e) (1988).

31. Withholding of deportation is the only form of relief that is mandatory. INA § 243(h), 8 U.S.C. § 1253(h) (1982); *see infra* notes 47–48 and accompanying text.

An IJ must consider all relevant factors of the alien's case before making a decision. *In re* Salim, Int. Dec. No. 2922 at 315 (BIA Sept. 29, 1982); *see also* Arteaga v. INS, 836 F.2d 1227,

the IJ's discretion, success for the alien hinges on his or her power to persuade the judge to rule favorably.

The forms of statutory relief provided by the INA vary according to the level and nature of the alien's interest. They include grants of voluntary departure, suspension of deportation, waiver of deportation, asylum, and withholding of deportation.

Voluntary departure[32] is the most common form of relief.[33] When seeking voluntary departure, the alien concedes deportability, chooses the place of destination, and pays for transportation.[34] The alien may then re-enter the country without waiting for the usual five-year period mandated by deportation.[35] Voluntary departure is available to all aliens not deportable on certain criminal or subversive grounds[36] who can demonstrate to the IJ good moral character for five years preceding the deportation.[37]

Suspension of deportation[38] allows an alien to adjust to lawful resident status. To be statutorily eligible, an alien must prove good moral character since the time of the deportable offense, establish that deportation would result in hardship, and, depending on the nature of the offense, document appropriate periods of continuous physical presence in the country.[39]

1231 (9th Cir. 1988) (case remanded due to opinion's failure to differentiate which standard was used in decision).

32. INA § 244(e), 8 U.S.C. § 1254(e) (1982).

33. For example, in 1986 there were 1,548,816 recorded voluntary departures out of a total of 1,611,471 aliens expelled. INS, U.S. DEPT. OF JUSTICE, 1986 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE xxxvii, 95 (1986). The vast majority of these were granted before a deportation hearing. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1044 (1984) (over 97.5% of aliens apprehended agree to voluntary departure without formal hearing).

34. INA § 244(e), 8 U.S.C. § 1254(e) (1982).

35. Deported aliens may not re-enter the country within five years without the Attorney General's express consent. INA § 212(a)(17), 8 U.S.C. § 1182(a)(17) (1982). If they re-enter, they are subject to criminal prosecution. INA § 276, 8 U.S.C. § 1326 (1982).

36. INA § 244(e), 8 U.S.C. § 1254(e) (1982). Voluntary departure is not applicable to any alien found deportable under INA § § 241(a)(4)–(7), (11), (12), (14)–(19), 8 U.S.C. §§ 1251(a)(4)–(7), (11), (12), (14)–(19) (1982 & Supp. IV 1986) (describing crimes involving moral turpitude, subversive activities, narcotics possession, prostitution, weapons conviction, registration or reporting violations, and former Nazis).

37. INA § 244(e), 8 U.S.C. § 1254(e) (1982). Voluntary departure is available without the five-year good moral character requirement if granted before a deportation hearing. INA § 242(b), 8 U.S.C. § 1252(b) (1982). Voluntary departure can also be set for a future date in the IJ's discretion to allow an alien to take care of personal affairs before leaving. 8 C.F.R § 244.2 (1988).

38. INA § 244(a), 8 U.S.C. § 1254(a) (1982).

39. If the deportable offense was criminal or subversive, the period of continuous presence is ten years, and the alien must also show "extremely unusual hardship." INA § 244(a)(2), 8 U.S.C. § 1254(a)(2) (1982). If the deportable offense was noncriminal or nonsubversive, the statute requires only seven years presence and "extreme hardship." INA § 244(a)(1), 8 U.S.C.

The INA also provides for a discretionary waiver of deportation.[40] A permanent resident who had a lawful domicile unrelinquished in this country for at least seven continuous years[41] can apply for such a waiver.[42] A discretionary waiver requires the IJ to balance equities, including such factors as the presence of United States citizen or permanent resident family members, receptivity to rehabilitation, acceptable reputation, age, health, and length of residency.[43]

Asylum and withholding of deportation are two forms of relief incorporated into the INA by the Refugee Act of 1980.[44] Asylum[45] is a discretionary remedy that permits an alien to take refuge in the United States because of a well-founded fear of persecution in his or her home country due to one or more of five statutory bases.[46] Withholding of deportation[47]—a mandatory remedy—temporarily protects an alien against return to a particular country when the alien can show his or her life would be threatened on account of the same

§ 1254(a)(1) (1982). Suspension of deportation requires the Attorney General to present the alien's name to Congress (for a period of two sessions in which either house can veto) before adjusting the alien's status. INA § 244(c), 8 U.S.C. § 1254(c) (1982). *But see* INS v. Chadha, 462 U.S. 919 (1983) (one-house veto held unconstitutional based on principles of separation of powers).

40. INA § 212(c), 8 U.S.C. § 1182(c) (1982).

41. Unrelinquished domicile differs from section 244(a)'s "continuous physical presence" in that it requires a fixed permanent home. *See In re* Sanchez, Int. Dec. No. 2751 at 221 (BIA Jan. 15, 1980) (domicile under section 212(c) requires intention of making United States one's home for indefinite future).

42. Although the INA provision states that this relief applies to residents who commit a deportable offense and then leave the country only to be excluded upon re-entry, courts have held that this waiver should also apply to aliens who, but for leaving the country, would otherwise qualify. *See* Francis v. INS, 532 F.2d 268, 273 (2d Cir. 1976) (equal protection of fifth amendment's due process clause requires extension of exclusion waiver to similarly situated aliens in deportation hearings); *see generally* 2 C. GORDON & H. ROSENFIELD, *supra* note 18, at § 7.4.

43. *In re* Marin, Int. Dec. No. 2666 (BIA Aug. 4, 1978).

44. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in various sections of the INA, 8 U.S.C. (1982 & Supp. IV 1986)).

45. INA § 208, 8 U.S.C. § 1158 (1982).

46. An alien qualifies for asylum by meeting the definition of "refugee" under INA section 101(a)(42). INA § 208, 8 U.S.C. § 1158 (1982). A "refugee" is a person unwilling or unable to return to a country of origin because of persecution, or a well-founded fear of persecution, on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1982). Asylum is valid for a one-year period and can be revoked if the conditions in the home country change. INA § 208(b), 8 U.S.C. § 1158(b) (1982). After one year, an alien can adjust to lawful permanent resident status. 8 C.F.R. § 209.2 (1988).

47. INA § 243(h), 8 U.S.C. § 1253(h) (1982).

statutory bases. The standard of proof is greater for withholding of deportation than for asylum.[48]

Through the above five forms of relief, the INA alleviates the harshness of deportation according to the nature and level of the alien's interest. All forms of relief require the alien to present convincing evidence to establish statutory eligibility. In addition, all but withholding of deportation require the alien to persuade the IJ to exercise favorable discretion.

B. Origins of an Alien's Right to Counsel

The Supreme Court has held that a deportation hearing is technically a civil, not a criminal, proceeding.[49] Despite the severity of deportation, courts have interpreted this classification to mean that the sixth amendment's guarantee of counsel[50] does not apply to immigration proceedings.[51] In fact, current constitutional doctrine as applied to immigration matters recognizes few limits on congressional discretion to define aliens' rights:[52] Congress determines who may enter this country and who may be deported.[53]

Congress has, however, passed statutory provisions giving aliens some procedural rights in deportation hearings.[54] Included among these is a right to counsel. The INA provides that:

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48. INS v. Stevic, 467 U.S. 407, 429–30 (1984) (for withholding of deportation alien must show a "clear probability" of persecution, similar to a "more likely than not" standard); INS v. Cardoza-Fonseca, 107 S. Ct. 1207, 1212–13 (1987) ("well founded fear" standard required for asylum relies in part on subjective fears and is less burdensome than "clear probability").

49. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (deportation proceeding is "a purely civil action").

50. "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

51. *See, e.g.*, Ramirez v. INS, 550 F.2d 560, 563 (9th Cir. 1977); Barthold v. INS, 517 F.2d 689, 690–91 (5th Cir. 1975).

52. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 32 (1982) (alien has no constitutional rights regarding application for admission). The constitutional source of the federal immigration power is not as apparent as its acceptance today seems to suggest. Because the Constitution fails to mention the power specifically, the Supreme Court has held that controlling immigration is inherent in a country's sovereignty. Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893); The Chinese Exclusion Case, 130 U.S. 581, 609 (1889). *See generally* T. ALEINIKOFF & D. MARTIN, *supra* note 20, at 1–37 (1985); Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny,* 100 HARV. L. REV. 853 (1987).

53. The Supreme Court has recognized Congress' plenary power over immigration. Fiallo v. Bell, 430 U.S. 787, 792 (1977) (Congress' legislative power over admission of aliens is more complete than over almost any other subject); Wong Wing v. United States, 163 U.S. 228, 231 (1896).

54. Section 242(b) of the INA directs the Attorney General to adopt regulations to assure the integrity of the deportation process (*e.g.*, reasonable notice of the charges, reasonable opportunity

> In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.[55]

The statutory right guarantees an alien access to counsel—at his or her own expense—during a deportation hearing.[56] On its face, the statutory right precludes the appointment of counsel for an indigent alien facing deportation.

Despite Congress' power over immigration matters, the Supreme Court has confronted the potential for harshness by recognizing that aliens in deportation hearings possess certain constitutional procedural safeguards.[57] For example, the INS cannot deport aliens unless it affords them a fair hearing in which they have an opportunity to be heard.[58] Thus, aliens have a fifth amendment right to a fundamentally

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to examine and present evidence and cross-examine witnesses, decision of deportability based on probative evidence, etc.). INA § 242(b), 8 U.S.C. § 1252(b) (1982).

55. INA § 292, 8 U.S.C. § 1362 (1982). This right is also described in INA section 242(b)(2). Regulations require an IJ to inform an alien of his or her right to counsel and of the availability of free legal services at the beginning of the deportation hearing, 8 C.F.R. § 242.16(a) (1988), and at other times during the deportation process. *Id.* § 242.1(c) (1988) (when served with order to show cause); *Id.* § 242.2(b)(2) (1988) (when served with warrant for arrest); *Id.* § 287.3 (1988) (during warrantless arrest).

56. The statute mentions deportation proceedings but does not specify whether this includes stages preceding the actual hearing. *See* Gordon, *Right to Counsel in Immigration Proceedings*, 45 MINN. L. REV. 875, 880–83 (1961).

57. But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution.

The Japanese Immigrant Case, 189 U.S. 86, 100 (1903).

58. Kwong Hai Chew v. Colding, 344 U.S. 590, 598 (1953); The Japanese Immigrant Case, 189 U.S. at 100–01.

However, these same procedural rights do not extend to all aliens. Excludable aliens (those deemed not to have entered the country—even though they may be physically within the United States) have virtually no constitutional procedural rights. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953) (INS can exclude a returning permanent resident alien without a hearing on the basis of undisclosed evidence); *see also* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

The *Knauff-Mezei* doctrine continues to influence the Court's determination of the scope of due process for excludable aliens. *But see* Landon v. Plasencia, 459 U.S. 21, 32 (1982) (resident alien returning from abroad has due process rights in exclusion hearing). *Plasencia* indicates some willingness by the Court to extend fuller constitutional protections to permanent resident aliens. *See Developments in the Law: Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1313–14 (1983) [hereinafter *Developments*].

fair hearing.[59] While protecting aliens' rights, some circuit courts have held that the INA provision allowing access to counsel reflects the constitutional mandates of their procedural rights.[60]

Courts have frequently discussed whether lack of counsel may deprive an alien of fundamental fairness. But courts so far have refused to go beyond the statutory right of access to counsel, and they have held that indigent aliens are not constitutionally entitled to appointed counsel.[61] However, in *Aguilera-Enriquez v. INS*[62] the court hinted that such an entitlement exists based on the fifth amendment. Although the court denied the petitioning indigent alien appointed counsel, it suggested in dicta that if presented with more compelling facts, it might accept this argument.[63]

C. Challenge Based on Lack of Counsel

To appeal successfully a deportation order on grounds of lack of right to counsel, an alien must first show a denial of the right and then show that lack of counsel was prejudicial to the case.[64]

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59. *See, e.g.,* Ramirez v. INS, 550 F.2d 560, 563 (9th Cir. 1977) ("Constitutional due process requirements under the Fifth Amendment are satisfied by a full and fair hearing.").

60. *See, e.g.,* Rios-Berrios v. INS, 776 F.2d 859, 862 (9th Cir. 1985) (due process entitles alien to counsel of own choice and own expense under the INA); Casteneda-Delgado v. INS, 525 F.2d 1295, 1300 (7th Cir. 1975) (aliens denied fifth amendment due process when IJ refused to grant them a second continuance to find an attorney).

61. *See, e.g.,* Aguilera-Enriquez v. INS, 516 F.2d 565, 569 (6th Cir. 1975), *cert. denied,* 423 U.S. 1050 (1976); Martin-Mendoza v. INS, 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied,* 419 U.S. 1113 (1975); Henriques v. INS, 465 F.2d 119, 121 (2d Cir. 1972), *cert. denied,* 410 U.S. 968 (1973).

Most courts have avoided a constitutional approach to the issue because of the existence of a statutory right. *See, e.g.,* Castro-O'Ryan v. INS, 821 F.2d 1415, 1420 (9th Cir. 1987).

62. 516 F.2d 565 (6th Cir. 1975), *cert. denied,* 423 U.S. 1050 (1976).

63. "Where an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government's expense. Otherwise, 'fundamental fairness' would be violated." *Id.* at 569 n.3. The court concluded that, given the alien's circumstances, appointment of an attorney would not have made any difference in the outcome and so was not prejudicial. *Id.*; *see also* Escobar Ruiz v. INS, 787 F.2d 1294, 1297 n.3 (9th Cir. 1986) ("The fifth amendment guarantee of due process applies to immigration proceedings and in specific proceedings, due process could be held to require that an indigent alien be provided with counsel despite the prohibition of section 292.").

64. *In re* Santos, Int. Dec. No. 2969 (BIA June 26, 1985). The test is whether in a given case the assistance of counsel would be necessary to provide "fundamental fairness—the touchstone of due process." Aguilera-Enriquez v. INS, 516 F.2d 565, 573 (6th Cir. 1975) (*quoting* Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973)), *cert. denied,* 423 U.S. 1050 (1976).

Several courts have specifically refused to decide whether proving prejudice is also necessary once there has been a denial of an alien's right to counsel. In each particular case the court found that prejudice in fact existed. *See, e.g.,* Colindres-Aguilar v. INS, 819 F.2d 259, 262 (9th Cir. 1987) (lack of counsel prejudicial to alien who made claims for withholding of deportation and asylum); *Rios-Berrios,* 776 F.2d at 863 (lack of counsel prejudicial to alien who made claims for

1. Denial of the Right to Counsel

A denial of the right to counsel can result from several possible situations in the deportation hearing. First, the IJ might fail to inform an alien of the right.[65] Second, the IJ might deny the alien a reasonable opportunity to obtain counsel.[66] Third, the alien's waiver of this right might be ineffective due to the IJ's failure to ensure the waiver was intelligently and understandingly made.[67]

To be meaningful, the right must ensure that an alien is provided with reasonable opportunity to obtain a lawyer.[68] But the opportunity need only be reasonable, and if counsel fails to appear or if an alien fails to secure counsel, the hearing may proceed.[69] Examples of lack of reasonable opportunity include insufficient time to contact an attorney,[70] refusal to grant a change of venue in order to have access to an attorney,[71] and transfer of aliens to locations away from their attorneys.[72]

As with other rights, an alien may waive the right to counsel. A waiver must be deliberate, and only an alien intelligently informed can waive this right.[73] However, the circuit courts have not agreed on

withholding of deportation and asylum); Chlomos v. INS, 516 F.2d 310, 314 (3d Cir. 1975) (lack of counsel held prejudicial).

65. *See, e.g.,* Villegas v. INS, 745 F.2d 950, 951 (5th Cir. 1984) (remand to determine if petitioner was informed of right to counsel; if not, then notice to re-open to be granted whether or not prejudice was shown). *But see* Delgado-Corea v. INS, 804 F.2d 261, 263 (4th Cir. 1986) (IJ's error in providing a wrong list of legal services (for Tucson and San Diego instead of Los Angeles) held not prejudicial because alien had already effectively waived right to counsel).

66. *See infra* notes 68–72 and accompanying text.

67. *See infra* notes 73–76 and accompanying text.

68. Regulations provide for an alien to ask for a continuance of the hearing to obtain representation. 8 C.F.R. § 242.16(d) (1988); *see also id.* § 242.13 (1988).

69. *See* Vides-Vides v. INS, 783 F.2d 1463, 1470 (9th Cir. 1986) (alien provided with list of free legal services and given two continuances (amounting to four months) to obtain an attorney was not denied right to counsel when he failed to obtain one); *see also* Gordon, *supra* note 56, at 885.

70. *See, e.g.,* Rios-Berrios v. INS, 776 F.2d 859, 862 (9th Cir. 1985) (alien denied right to counsel when IJ's continuances amounted only to two working days).

71. *See, e.g.,* Castro-O'Ryan v. INS, 821 F.2d 1415, 1420 (9th Cir. 1987) (IJ's refusal to grant alien's request for change of venue prevented opportunity to obtain counsel); Chlomos v. INS, 516 F.2d 310, 314 (3d Cir. 1975) (IJ's refusal to grant change of venue to state where alien's counsel resided held to be prejudicial).

72. *See, e.g.,* Committee of Cent. Am. Refugees v. INS, 795 F.2d 1434, 1441 (9th Cir. 1986) (preliminary injunction preventing INS from transferring aliens denied because it did not interfere with *existing* attorney/client relationship), *amended,* 807 F.2d 769 (1987). *See generally* Comment, *INS Transfer Policy: Interference With Detained Aliens' Due Process Right to Retain Counsel,* 100 HARV. L. REV. 2001 (1987).

73. *In re* Gutierrez, Int. Dec. No. 2587 at 228 (BIA May 26, 1977). The waiver must not be tainted by coercion, mental incapacity, or inadequate comprehension. *See* 1 C. GORDON & H. ROSENFIELD, *supra* note 18, § 1.23a(2).

what constitutes an effective waiver. Some courts have placed high standards on the requirement that an alien intelligently waive the right to counsel. For example, in *Barthold v. INS*[74] the court held that the alien effectively waived his right to counsel only after the IJ had closely scrutinized the waiver and described in detail the alien's right to examine evidence.[75] Some courts have also held that an IJ's failure actively to preserve the alien's right to counsel results in an ineffective waiver and thus a denial of the right.[76]

2. *Prejudice to the Alien: The Case-by-Case Approach*

To prevail on appeal of deprivation of the right to counsel, an alien must also show that lack of counsel at the deportation hearing was prejudicial—that the presence of counsel would have made a difference. Instead of formulating a general rule to evaluate what circumstances constitute prejudice to an alien, reviewing courts have used a case-by-case approach to determine if the written record reveals prejudice to an alien.[77]

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74. 517 F.2d 689 (5th Cir. 1975).

75. The dialogue between the IJ and the alien was (in part):

Q: You have the right to be represented by an attorney at this hearing, if you want, or you can go ahead if you do not choose to be represented. . . . However, if you do not have the money to afford an attorney, I can adjourn the case and give you the opportunity to contact Legal Services to see whether or not they will provide an attorney for you. Do you have . . . sufficient money to pay for an attorney?

A: No Sir.

Q: Well, do you want the opportunity to call Legal Services to see if they will provide you with an attorney?

A: I will continue without an attorney.

Q: Very well. If at any time during the course of the proceedings you feel that you are unable to represent any more or that you think an attorney's answer will be necessary, just let me know and I will adjourn the case to still give you a chance to get one. You understand that you will have this continuing right until the case is completed?

A: Yes.

Id. at 691. *Cf.* Partible v. INS, 600 F.2d 1094, 1096 (5th Cir. 1979) (alien's waiver not competent due to complexity of her case and failure of IJ to inform her of the "cogent legal arguments" which could have been made). *But see* United States v. Polanco-Gomez, 841 F.2d 235, 237 (8th Cir. 1988) (waiver held to be effective when IJ asked 52 aliens at once if they wished to waive their right to counsel where record did not reflect whether interpreter asked each one individually).

76. *See, e.g.*, Castro-O'Ryan v. INS, 821 F.2d 1415, 1420 (9th Cir. 1987) (alien's "laconic answer" to IJ held not to be an intelligent, voluntary waiver of counsel); Rios-Berrios v. INS, 776 F.2d 859, 863 (9th Cir. 1985) (alien's failure at continued hearing to repeat wish to be represented by counsel held not to be a waiver); Castro-Nuno v. INS, 577 F.2d 577, 579 (9th Cir. 1978) (alien's appearance without counsel and statement that he could not locate counsel held not to be a waiver; IJ should have acted *sua sponte* to continue hearing and give alien chance to get attorney).

77. *Castro-O'Ryan*, 821 F.2d at 1419.

Courts generally have not found prejudice in cases where the record suggests that the law and facts were clear in the original deportation hearing. For example, in *Henriques v. INS*[78] the court found that lack of counsel was not prejudicial to the alien because no excuses or justifications for a visa overstay were offered on appeal; counsel could not have obtained any other result.[79] In *Aguilera-Enriquez v. INS*[80] the alien was found deportable because of a drug possession conviction when he re-entered the country. The court held that lack of counsel did not constitute prejudice because the drug conviction precluded any defense to deportability a lawyer could have raised.[81]

On the other hand, courts have often found prejudice in cases where the IJ denied relief despite the alien's statutory eligibility. In *Colindres-Aguilar v. INS*[82] the IJ refused to award withholding of deportation and asylum to an alien who was not represented by counsel. The court of appeals found prejudice, reasoning that counsel could have better presented the specific facts for asylum.[83] In *Rios-Berrios v. INS*[84] the court also found prejudice because a lawyer could have done a better job than the alien persuading the IJ to award withholding of deportation and asylum.[85]

78. 465 F.2d 119 (2d Cir. 1972), *cert. denied,* 410 U.S. 968 (1973).

79. *Id.* at 120–21. The indigent alien had asked for an appointed attorney. The alien's counsel on appeal argued that appointed counsel could have advised the alien on the eligibility for a preference visa, and that the INS almost always grants suspension of deportation due to visa eligibility. The court rejected this argument because acceptance would mean that the government in effect would be providing free advice on how best to immigrate to this country. *Id.* at 121; *see also* Villanueva-Jurado v. INS, 482 F.2d 886, 888 (5th Cir. 1973) (alien's only defense available was to attack the constitutionality of the statute and so had no immigration claim).

This requirement to show prejudice, known as the harmless error exception, has been specifically rejected in two circuits. Casteneda-Delgado v. INS, 525 F.2d 1295, 1300 (7th Cir. 1975); Yiu Fong Cheung v. INS, 418 F.2d 460, 464 (D.C. Cir. 1969) ("some rights, like the assistance of counsel, are so basic to a fair trial that their infraction can never be treated as harmless error").

80. 516 F.2d 565 (6th Cir. 1975), *cert. denied,* 423 U.S. 1050 (1976).

81. *Id.* at 569. In Cobourne v. INS, 779 F.2d 1564 (11th Cir. 1986), the IJ denied a section 212(c) waiver for a lawful permanent resident found deportable for marijuana possession on reentry. The court of appeals held there was no prejudice because the outcome would not have been different since the law was clear and the facts undisputed. Even though the alien was statutorily eligible for the waiver, the court did not think that an attorney could have aided the alien in presenting his claim. *Id.* at 1566.

82. 819 F.2d 259 (9th Cir. 1987).

83. *Id.* at 262.

84. 776 F.2d 859 (9th Cir. 1985).

85. "[W]e are convinced that his asylum case will be more advantageously presented by retained counsel." *Id.* at 863; *see also* Castro-O'Ryan v. INS, 821 F.2d 1415, 1420 (9th Cir. 1987) (alien's case for withholding of deportation and asylum seriously prejudiced by lack of legal assistance).

II. RECOGNIZING AN ALIEN'S CONSTITUTIONAL RIGHT TO COUNSEL

A. Limitations of the Case-by-Case Approach

Under the case-by-case approach, the reviewing court relies on the written record—a record made without the assistance of legal representation—to determine whether prejudice existed.[86] The court must look at the alien's presentation of the case and then speculate whether counsel would have acted differently. It amounts to a judicial guess whether the presence of an attorney would have made a difference. The case-by-case approach also precludes adoption of a uniform rule and leaves the IJ without guidelines to determine whether lack of counsel will be deemed prejudicial on appeal.

The reviewing court's speculation is easier in some cases than others. A reviewing court could easily conclude that a glaring mistake, such as an IJ's misapplication of statutory criteria, would have met any competent immigration attorney's objection.[87] On the other hand, deciding exactly when lack of counsel prejudices an alien applying for statutory relief presents a more difficult determination.[88]

The IJ must also resort to speculation—although at this stage speculation takes the form of a prediction. The IJ must determine in advance of the hearing if the lack of legal representation might prejudice the alien.[89] Whether speculation takes the form of hindsight or prediction, no standard can emerge with a case-by-case approach because each case provides a unique fact pattern.[90]

The Supreme Court recognized the shortcomings of case-by-case, after-the-fact review of the right to counsel when rejecting it in the criminal context.[91] Although the Court continues to use this case-by-

86. INA § 106(a)(4), 8 U.S.C. § 1105a(a)(4) (1982) (petition for judicial review shall be determined solely upon the administrative record).

87. *See, e.g., Castro-O'Ryan*, 821 F.2d at 1420 (IJ failed to distinguish the effects of a drug conviction on applications for withholding of deportation and asylum).

88. *See, e.g.,* Colindres-Aguilar v. INS, 819 F.2d 259, 262 (9th Cir. 1987) (counsel could have "better marshaled specific facts" for presenting alien's claims for asylum and withholding of deportation).

89. *See, e.g.,* Partible v. INS, 600 F.2d 1094, 1096 (5th Cir. 1979) (ineffective waiver due to IJ's failure to anticipate and to inform alien of cogent legal arguments that could have been made).

90. *Compare* Cobourne v. INS, 779 F.2d 1564, 1566 (11th Cir. 1986) (attorney could not have aided in presentation of section 212(c) waiver claim where alien was statutorily eligible) *with* Rios-Berrios v. INS, 776 F.2d 859, 863 (9th Cir. 1985) (asylum case could have been more advantageously presented by counsel).

91. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (requiring appointed counsel for misdemeanor cases involving possible imprisonment); Gideon v. Wainright, 372 U.S. 335, 339 (1963) (overruling special circumstances rule of Betts v. Brady, 316 U.S. 455 (1942), and

case method in areas of law such as probation revocation,[92] school disciplinary proceedings,[93] and parental rights termination,[94] these hearings differ markedly from a deportation hearing.[95] Unlike these proceedings, a deportation hearing is adversarial by nature,[96] and the INS will provide a trial attorney even if the alien lacks counsel.[97] In addition, the consequences of an unfavorable outcome in an informal hearing such as a school disciplinary proceeding are not as severe as deportation.[98]

B. An Alien Has a Constitutional Right to Counsel

Courts have refused to guarantee an alien the right to appointed counsel under the sixth amendment because deportation hearings are technically classified as civil in nature.[99] Because of the courts' hostility to this sixth amendment argument, the fifth amendment presently

requiring appointed counsel for all felony trials); Glasser v. United States, 315 U.S. 60, 76 (1942) ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.").

92. Gagnon v. Scarpelli, 411 U.S. 778, 791 (1973).

93. Goss v. Lopez, 419 U.S. 565, 584 (1975).

94. Lassiter v. Department of Social Servs., 452 U.S. 18, 32–33 (1981).

95. The Court in *Lassiter* decided against appointed counsel basically because the proceeding was not so complex or troublesome that counsel would have made a difference. *Id.*

96. *See supra* notes 17–20 and accompanying text.

97. *See supra* note 19.

98. *See supra* notes 24–29 and accompanying text. *But see Lassiter*, 452 U.S. at 38 (Blackmun, J., dissenting) (emphasizing the unique nature of the interest of parental rights). In *In re* Gault, 387 U.S. 1, 36, 41 (1967), the Court required the appointment of counsel for juvenile hearings by noting the similarity of the consequences between a juvenile detention center and an adult correctional facility and concluded that the individual's liberty interest was sufficiently weighty to have constitutional significance. For an article arguing that *Gault* is sufficient precedent for extending the same right to counsel to deportation hearings, see Haney, *Deportation and the Right to Counsel,* 11 HARV. INT'L L.J. 177 (1970).

99. *See, e.g.,* Ramirez v. INS, 550 F.2d 560, 563 (9th Cir. 1977); Murgia-Melendrez v. INS, 407 F.2d 207, 209 (9th Cir. 1969). These cases ignore the parallel between deportation and criminal consequences. Grounds of deportability often constitute crimes themselves, and a deportation proceeding often includes incarceration. Both outcomes result in a severe penal sanction.

Even the Supreme Court's recent affirmation of the "civil" nature of deportation recognizes a role for the possible application of the sixth amendment's right to counsel in a deportation hearing. In INS v. Lopez-Mendoza, 468 U.S. 1032, 1051 (1984), the Court held that the fourth amendment's exclusionary rule does not apply to deportation; some constitutional provisions that are afforded in a criminal trial do not apply due to deportation's civil nature. Justice O'Conner, writing for the majority, qualified this by noting that the Court was not ruling on an "egregious violation of Fourth Amendment or other liberties that *might transgress notions of fundamental fairness.*" *Id.* at 1050 (emphasis added). This caveat essentially uses the fifth amendment as a last line of defense against egregious fourth amendment violations. Accordingly, if an alien's interest is strong enough that lack of counsel becomes an egregious violation of fundamental fairness, the sixth amendment guarantee could similarly be contained in fifth amendment guarantees.

provides the most solid foundation for a deportable alien's right to counsel.[100] In order to use this constitutional approach, the alien must first establish a protected interest[101] and then show that assistance of counsel is a necessary part of the process due.[102]

1. An Alien's Liberty Interest Requires Due Process

Courts have recognized that liberty means not only the freedom from bodily restraint, but also freedom of action and freedom of choice.[103] Aliens have a liberty interest in remaining in this country.[104] Stemming from this constitutional interest, Congress has provided aliens with statutory avenues to petition for relief.[105] In order to receive the due process that protects the liberty interest, an alien must have a meaningful opportunity to make a claim protecting this liberty interest.

The assistance of counsel for filing a petition for relief is necessary to make aliens' constitutional rights meaningful. Counsel is often needed simply to inform an alien of the available relief under the INA.[106] The statutory criteria themselves are sufficiently vague and complex that an alien without counsel would have difficulty knowing what type of evidence is required to meet them. For example, in order to obtain suspension of deportation, an alien must show, among other

100. Although the arguments used in this Comment can also apply to aliens who challenge the grounds of deportation, the scope of this paper necessarily limits the discussion to aliens who concede deportability and apply for relief. Besides, in 80% of the deportation hearings the aliens concede deportability. 1A C. GORDON & H. ROSENFIELD, *supra* note 18, § 5.7a.

101. The due process clause of the constitution protects life, liberty, and property from arbitrary deprivation. U.S. CONST. amend. V.

102. Morrisey v. Brewer, 408 U.S. 471, 481 (1972) ("once it is determined that due process applies, the question remains what process is due. . . . [D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

103. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 572 (1972). Yet the Supreme Court also noted that not every limitation of individual freedom will be a violation of liberty in a constitutional sense. *Id.* at 569–70; *see generally* 2 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 226–33 (1986).

104. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 34–35 (1982) (returning lawful permanent resident has liberty interest which must be weighed when deciding what process is due in an exclusion hearing).

105. *See supra* notes 32–48 and accompanying text.

106. Although regulations direct the IJ to inform an alien whether he or she is eligible to apply for relief, 8 C.F.R. § 242.17(a) (1988), the potential failure to protect the alien's best interests is apparent from the institutional bias of having the IJ work for the same employer as the prosecutor—an agency whose mission is the expeditious enforcement of the immigration laws. *See Developments, supra* note 58, at 1364–65, 1370–72. The Justice Department recently attempted to remedy this conflict by reorganizing the IJs into the separate Executive Office for Immigration Review and thus keeping them from being directly accountable to the INS. *See* 8 C.F.R. § 3 (1988). Yet the IJs ultimately continue to work for the same governmental agency and should not be entrusted as an impartial guardian of aliens' best interests.

things, that extreme hardship would result from deportation.[107] The INS, however, has not promulgated regulations describing what factors of hardship an IJ should consider.[108] In addition to acquiring knowledge of substantive law, an alien would have to present the necessary evidence and witnesses, cross-examine the government's case, and be familiar with the general rules of procedure for the hearing.

Most forms of statutory relief lie within the discretion of the IJ and call for more legal skill than the alien is likely to have. Persuasive organization and presentation of evidence are essential for a successful claim. Only an attorney will have the professional training and experience needed to meet the difficult evidentiary burdens and ensure a fair opportunity to be heard on a claim for relief. For instance, the burden of demonstrating a well-founded fear of persecution, needed for asylum,[109] is compounded in difficulty when the evidence and witnesses are in another country.

2. *Levels of Alien Interests*

The procedural due process balancing test articulated in *Mathews v. Eldridge*[110] provides further support for a deportable alien's right to counsel. The test balances the petitioner's interest, along with the risk of error and probable value of the proposed procedural safeguard, against the government's interest, which includes fiscal and administrative burdens.[111] To apply the balancing test to an alien in a deportation hearing, a court would weigh the alien's interest in staying in the country, and the extent to which the presence of an attorney would reduce the possibility of administrative error, against the government's interest in avoiding the fiscal and administrative burdens imposed by providing counsel.

In order to apply the *Mathews* test accurately, one must distinguish aliens on the basis of their interest in staying in this country. This

107. INA § 244(a), 8 U.S.C. § 1254(a) (1982); *see supra* notes 38–39 and accompanying text.

108. In 1979 the INS proposed regulations describing factors to be considered for adjustment of status and other discretionary relief provisions. 44 Fed. Reg. 36,187–93 (1979). In 1981 the agency abandoned this project "[t]o avoid the possibility of hampering the free exercise of discretionary authority." 46 Fed. Reg. 9119 (1981). Case law outlines some general factors the BIA has considered for this discretionary request. *See, e.g.*, Villena v. INS, 622 F.2d 1352, 1357–58 (9th Cir. 1980) (factors include alien's contribution to the community, effect of alien's separation from family (including hardship to citizen child), economic hardship to alien). However, even reliance on case law would require the alien to perform legal research before presenting his or her case.

109. *See supra* note 46.

110. 424 U.S. 319 (1976).

111. *Id.* at 335.

interest should correspond to an alien's need for representation.[112] Aliens have varying interests according to their status. For example, a long-term lawful permanent resident with significant family and economic ties will have a greater interest in staying in the United States than an alien overstaying a tourist visa. The difficulty lies in deciding how to make the distinctions in less clear-cut cases.[113]

One can make distinctions between levels of aliens' interest according to the available statutory relief provisions of the INA. The relief provisions discriminate among various aliens by allowing some to apply for relief while forbidding others. For instance, suspension of deportation is available only to aliens who have resided in the United States for at least seven or ten years.[114] A section 212(c) waiver also is available only to long-term, lawfully permanent residents.[115] Aliens who are qualified to make a claim for statutory relief have a greater interest in access to counsel than those aliens who are statutorily ineligible.

The level of interest is not the same in all claims for statutory relief. Voluntary departure, the most common form of relief, has the most lenient statutory criteria. An alien merely has to show the ability to pay for transportation and that nothing in the record for the preceding five years reveals lack of good moral character.[116] The evidentiary burden is not especially difficult, and the relief can apply to a broad class of deportable aliens.[117] The evidentiary burdens and the applicability of other forms of relief, however, are more difficult and obscure.[118] An alien who makes a claim to statutory relief other than or in addition to voluntary departure has a weightier interest in having the assistance of counsel. An indigent alien shares this interest for legal assistance. Unless free legal aid is available, the right to counsel

112. One commentator makes a distinction by the consequences of deportation, e.g., counsel should be appointed to all asylum seekers. Comment, *The Right to Appointed Counsel in Asylum Proceedings,* 85 COLUM. L. REV. 1157 (1985).

113. One commentator has suggested that levels of aliens' interest can be determined according to an alien's ties to the community. A model of concentric circles can be constructed with citizens in the center, lawful permanent residents in the next circle and first-time applicants in the outer-most circle. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond,* 44 U. PITT. L. REV. 165, 208–34 (1983); *see also* Aleinikoff, *Aliens, Due Process and 'Community Ties': A Response to Martin,* 44 U. PITT. L. REV. 237 (1983).

114. INA § 244(a)(1), (2), 8 U.S.C. § 1254(a)(1), (2) (1982). *See supra* notes 38–39 and accompanying text.

115. INA § 212(c), 8 U.S.C. § 1182(c) (1982); *see supra* notes 40–43 and accompanying text.

116. INA § 244(e), 8 U.S.C. § 1254(e) (1982).

117. *See supra* notes 32–33 and accompanying text.

118. For example, compare the two "hardship" requirements for suspension of deportation. *See supra* note 39.

for indigent aliens would result in a meaningless and unequally applied right.[119]

One can also measure the risk of administrative error according to the various statutory relief provisions. Voluntary departure has the lowest level of risk. A denial merely forbids the alien from returning for five years without first getting written permission from the Attorney General; a grant of voluntary departure still requires the alien to leave the country.[120] For other forms of relief the risk is much higher. An erroneous decision denying relief banishes an alien from this country and destroys the freedom and ties that accompany lawful status.[121]

3. The Government's Interest

The government's interest involves the efficient administration of the immigration laws. Its overriding interest is in efficiency and effective decisionmaking—to meet the minimum due process notions without encouraging unnecessary delay or complications. The government has a financial and administrative interest in not having to provide counsel in all deportation hearings. Yet, the cost to the government might not be as great as it seems. The presence of an attorney for the indigent alien could reduce the number of reversible errors committed during a hearing because an attorney would be vigilant for the alien's rights. This vigilance would in turn reduce the number of costly appeals. Moreover, the INS detains many aliens from the time it issues them an order to show cause until the end of the deportation hearing. Providing counsel could reduce the detention time because an alien would not need to ask for continuances to obtain an attorney. Cutting down the overall delay would be especially attractive to the government because of its administrative interest in an expeditious system.

The government would not have to provide counsel in all deportation hearings because in most urban areas there is an existing network of pro bono and legal aid societies already providing assistance to aliens. The government would merely be required to fill in the gaps.[122]

119. *See, e.g.*, Aguilera-Enriquez v. INS, 516 F.2d 565, 572 (6th Cir. 1975) (DeMascio, J., dissenting) ("[I]t is unconscionable for the government to unilaterally terminate that agreement [to allow the alien lawful residence] without affording an indigent resident alien assistance of appointed counsel. Expulsion is such lasting punishment that meaningful due process can require no less."), *cert. denied*, 432 U.S. 1050 (1976).

120. INA § 244(e), 8 U.S.C. § 1254(e) (1982).

121. *See supra* notes 24–29 and accompanying text.

122. The requirement that the government appoint attorneys may reduce incentive for some legal aid groups to provide assistance and might also reduce the incentive for an alien to seek out free legal aid. Yet the willingness of the bar to provide pro bono work will continue to exist. If

Other factors limiting the government's cost would be the status of the alien and the type of relief being sought. Because voluntary departure has such a low risk of administrative error[123] and because the vast majority of aliens apprehended take advantage of this relief,[124] an indigent alien whose only claim to relief is voluntary departure would not have a great enough interest to warrant appointment of counsel.

The balancing test is not always a good indicator of what courts will do because the personal values of each judge play an unpredictable role in reaching the decision. Yet an alien has a weighty interest at stake. The risk of prejudicial error and the legal system's evidentiary difficulties make the present statutory right to counsel insufficient to protect the alien's right to be heard in a meaningful manner.

C. A Model Based on Statutory Claims to Relief

An approach that focuses on an alien's claim to statutory relief could identify consistently which aliens would be prejudiced by lack of counsel. Such an appeal would also obviate the need for speculative analysis.[125]

1. The Determination of Prejudice

Under current court of appeals analysis, an alien must experience prejudice before the right to counsel will be deemed to be violated. The circuit court cases previously discussed,[126] when taken together, reveal a consistent pattern in which reviewing courts find prejudice to the alien. In those cases where the courts did find prejudice, the aliens had made claims for some type of statutory relief.[127] The reviewing courts realized that attorneys could have aided these aliens in presenting their cases before the IJ.

On the other hand, in those cases where no prejudice was found, the aliens were not arguing on appeal that they could have made a claim for statutory relief at the original hearing.[128] An attorney's role in such cases would have been minimal. Due to the specific facts sur-

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the government would take over the coordination of administering pro bono assistance, the program could be integrated more efficiently. To the indigent alien, all counsel would appear appointed.

123. *See supra* note 120 and accompanying text.

124. *See supra* note 33.

125. *See supra* notes 86–90 and accompanying text.

126. *See supra* notes 64–85 and accompanying text.

127. *See supra* notes 82–85 and accompanying text.

128. *See supra* notes 78–81 and accompanying text.

rounding the grounds for deportation, statutory relief was not available.[129]

2. *A Claims-Based Model*

As shown above, the posture of the alien's case—in relation to the available statutory relief—has usually determined whether the lack of counsel would have been prejudicial. This distinction can provide a model for determining an alien's right to counsel. If an alien has made a claim to statutory relief, then a reviewing court could find that lack of access to counsel was prejudicial and a deprivation of the alien's constitutional right to a fundamentally fair hearing.[130] This type of review could give an IJ definite guidelines for determining when lack of counsel will be deemed prejudicial to an alien. Such review would also distinguish the varying interests of all aliens in deportation hearings and require appointed counsel only for those aliens whose interests demand it.

Because the determination of statutory eligibility sometimes depends on gathering a complex set of facts, the IJ cannot always know at the beginning of the hearing whether an alien is able to make a claim for relief. As long as the alien is not ineligible due to specific statutory criteria,[131] the IJ could presume a valid claim exists.[132] One method for determining eligibility would be to set up an initial screening procedure. The INS could require an alien to complete a form designed to elicit specific facts in order to see if the alien might be able to make a claim for relief.

The claims-based model would also require a system to screen aliens for indigence.[133] If an alien claimed not to be able to afford an attor-

129. An exception was Cobourne v. INS, 779 F.2d 1564 (11th Cir. 1986), where the alien was eligible for a section 212(c) waiver but the IJ did not grant it in his exercise of discretion.

130. This model does not exclude the possibility that there may be other reasons for a reviewing court to reverse a deportation order on the grounds of prejudice to an alien's right of fundamental fairness, even though counsel was present.

131. For example, withholding of deportation requires an alien to show a clear probability of persecution. However, a conviction of a particularly serious crime bars statutory relief. INA § 243(h)(2)(B), 8 U.S.C. § 1253(h)(2)(B) (1982). An alien with a drug conviction cannot make a claim to withholding of deportation. Castro-O'Ryan v. INS, 821 F.2d 1415, 1420 (9th Cir. 1987).

132. This presumption does not shift the burden from the alien who still has to prove eligibility for relief, but merely requires the IJ to inquire carefully about an alien's possible eligibility before proceeding.

133. Defining indigence would parallel use in the criminal justice system. Determination must be made by the IJ on the basis of as complete a financial picture as is feasible to obtain in the circumstances. Aliens should not need to be totally devoid of revenue to be indigent; it should be sufficient that they lack financial resources to retain a competent attorney.

ney, the initial screening procedure could alert the IJ to provide a listing of the area's free legal services, and possibly to appoint counsel. The government's interest, as weighed against the alien's interest and the risk of error, would still preclude appointed counsel for all indigent aliens; under this model aliens whose only claim for relief is voluntary departure would not get appointed counsel.[134] An alien's status and ability to make a claim for relief would determine whether lack of counsel will be prejudicial and, if indigent, whether the level of interest mandates appointed counsel.[135]

An alien, after being notified of the right to counsel and after being given a reasonable opportunity to exercise it, may decide to proceed without an attorney.[136] In this case, the alien's due process rights would require the IJ to ensure that the alien had effectively waived the right. The waiver must be deliberate and intelligent. "Deliberate" means that the alien must explicitly waive the right. Silence or lack of a motion for continuance to obtain counsel should not constitute a sufficient waiver.[137] "Intelligent" means that the alien must know the effect of the waiver and know about the rights he or she has to partici-

134. *See supra* notes 110–121 and accompanying text. By prohibiting appointed counsel to indigent aliens whose only claim is voluntary departure, this model would not encourage legal delays for those thousands of aliens who regularly get caught crossing the border, take immediate voluntary departure and return home only to try again the next day. If there is no chance for appointed counsel, there is no chance to wait for a deportation hearing in order to get access to free legal advice.

135. Thus, in Henriques v. INS, 465 F.2d 119 (2d Cir. 1972) (alien overstayed a tourist visa and made no claim to statutory relief), *cert. denied,* 410 U.S. 968 (1973), and Villanueva-Jurado v. INS, 482 F.2d 886 (5th Cir. 1973) (alien made no claim to relief), and Aguilera-Enriquez v. INS, 516 F.2d 565 (6th Cir. 1975) (alien's prior drug conviction precluded claim for relief), *cert. denied,* 423 U.S. 1050 (1976), the model would have predicted that lack of counsel would not be prejudicial to the alien.

In Rios-Berrios v. INS, 776 F.2d 859 (9th Cir. 1985) (alien made a claim to withholding of deportation and political asylum as well as voluntary departure), Colindres-Aguilar v. INS, 819 F.2d 259 (9th Cir. 1987) (alien made a claim to withholding of deportation and political asylum), and Castro-O'Ryan v. INS, 821 F.2d 1415 (9th Cir. 1987) (alien's drug conviction was a bar to withholding but not a bar to asylum claim), the IJs, using this model, would have realized the prejudice inherent in proceeding without counsel and would have required a more explicit waiver before proceeding.

However, in Cobourne v. INS, 779 F.2d 1564 (11th Cir. 1986) (alien claimed a section 212(c) discretionary waiver), the model would have predicted that lack of counsel would be prejudicial to the alien's case because an attorney would be necessary to ensure an adequate opportunity and a fair chance to persuade the IJ to exercise favorable discretion.

136. *See supra* notes 73–76 and accompanying text.

137. *See, e.g.,* Colindres-Aguilar v. INS, 819 F.2d 259, 260 (9th Cir. 1987) (record reflecting that IJ said, "I note the presence of [Colindres-Aguilar]. He is in *pro se,*" held not to be satisfactory inquiry into whether alien still desired representation).

pate in the hearing.[138] Because of the importance of the alien's fifth amendment rights, the review of a waiver should be as stringently applied as the review of the sixth amendment right to counsel waiver in a criminal proceeding.[139]

III. CONCLUSION

A deportable alien acknowledges that the law demands he or she leave the country. Yet the law also states that certain aliens are eligible for relief from deportation. Denial of counsel for these aliens not only precludes fair access to relief, but in some circumstances violates their constitutional rights. Congress recognized the importance and need for an alien to have the assistance of counsel in a deportation hearing when it passed the INA, which provides a statutory right of access to counsel.[140] Despite this acknowledgement, Congress has refused to provide appointed counsel for indigent aliens.[141] The courts must ensure that aliens receive their full constitutional rights.

At a minimum, constitutional notions of fundamental fairness require that a deportable alien have a meaningful opportunity to be heard. This opportunity includes a reasonable chance to obtain counsel and, if the alien's interest is sufficiently weighty, government-appointed counsel. A claims-based model would guarantee aliens their rights by creating uniformity throughout the circuits and by limiting the right of appointed counsel to indigent aliens whose interest is great enough to need protection.

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138. *See, e.g.*, Barthold v. INS, 517 F.2d 689 (5th Cir. 1975); *see supra* notes 74–75 and accompanying text. The IJ should consider all relevant factors about the alien, including age, intelligence, education, and ability to comprehend the language, before deciding what will suffice as an effective waiver.

139. *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458, 465 (1938) (the trial judge in a criminal proceeding has a "protecting duty" to determine if the waiver is intelligent and competent and that determination should appear in the record).

140. *See supra* note 55 and accompanying text.

141. In its final report, the Select Commission on Immigration and Refugee Policy recommended a statutory amendment to provide counsel at government expense for indigent permanent resident aliens in exclusion and deportation hearings. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST VIII B.2 (1981).